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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SAMUEL REECE,

B286623

Plaintiff and Appellant,

(Los Angeles County

Super. Ct. No. BC651169)

v.

WELLS FARGO BANK, N.A.,

Defendant and
Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County, David Sotelo, Judge. Reversed.

Samuel Reece, in pro. per., for Plaintiff and Appellant.

Severson & Werson, Jan T. Chilton, Kerry W. Franich, for Defendant and Respondent.

Plaintiff and appellant Samuel Reece appeals from a judgment of dismissal following an order sustaining a demurrer without leave to amend in favor of defendant and respondent Wells Fargo Bank, N.A. (the Bank), in this action arising out of a reverse mortgage agreement entered into by his mother, decedent Stella Reece.¹ On appeal, Samuel contends: (1) the applicable statutes of limitations were tolled by reason of insanity within the meaning of Code of Civil Procedure section 325, subdivision (a); (2) the complaint states causes of action for financial elder abuse under the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) (the Elder Abuse Act), equitable rescission, and quiet title; and (3) the complaint can be amended to allege several causes of action. We conclude that the complaint contains sufficient allegations of Stella's incapacity to transact business or understand the nature of her actions to toll the applicable statutes of limitations. The complaint states a cause of action for elder abuse and can be amended to state a cause of action for rescission. Samuel has not shown that the complaint can be amended to state any other cause of action. Therefore, we reverse with directions.

¹ Because more than one participant shares the last name Reece, they will be referred to individually by their first names. No disrespect is intended.

FACTUAL AND PROCEDURAL HISTORY

Allegations of the Complaint

On February 21, 2017, Samuel filed a complaint which is not contained in the record on appeal. Samuel filed an amended complaint on July 20, 2017, in propria persona, against the Bank and two additional defendants for elder abuse, constructive fraud, breach of fiduciary duty, declaratory relief, quiet title, and injunctive relief. The complaint alleged as follows.

Stella owned a home on South Avalon Boulevard in Wilmington, California. She was over the age of 82 when she entered into a reverse mortgage agreement with the Bank on August 20, 2008. She had substantial physical and mental limitations that restricted her ability to read, understand, and carry out normal activities to protect her rights and finances. The Bank knew or should have known that Stella suffered from dementia, stroke, impaired cognitive function, diminished mental understanding, blindness and other disabilities.

Federal regulations require that reverse mortgage applicants receive counseling prior to finalization of the loan application from an independent, United States Department of Housing and Urban Development (HUD) qualified counseling agency that is not employed by, associated with, or compensated by the lender or loan originator. The Bank was aware of the state and federal regulations that required providing names and addresses so that Stella could receive objective and independent counseling, in order to make an informed decision about whether a reverse mortgage was in her best interest, and to refrain from

the appearance of or an actual conflict of interest. The Bank did not provide Stella with a list of independent, HUD-qualified and approved counseling agencies or take steps to ensure that Stella received mandatory reverse mortgage counseling from an independent, HUD-approved counseling agency, not associated with or compensated by the Bank, prior to finalizing her loan application. The Bank did not obtain a HUD Form 92902 Home Equity Conversion Mortgage Counseling Certificate.

The Bank sent John Couste to provide reverse mortgage counseling to Stella. Couste was employed by, associated with and/or compensated by the Bank, creating a conflict of interest in violation of state and federal regulations. The Bank knew Couste was disqualified from serving as a reverse mortgage counselor, had not completed the mandatory HUD education course, and did not meet other qualifications for a reverse mortgage counselor. If Couste had revealed his lack of qualifications and conflicts of interest, and had Stella received the mandatory HUD counseling from an independent and HUD-qualified counselor, it is reasonably probable Stella would not have entered into the reverse mortgage and have selected alternative financing or decided against a reverse mortgage altogether.

Stella was pressured and unduly influenced to take out a reverse mortgage. The Bank failed to comply with HUD regulations to investigate and detect Stella's legal incapacity to contract due to mental incapacitation caused by stroke, dementia, blindness, and other maladies. Instead, the Bank originated the loan. On the date that Stella entered into the reverse mortgage agreement, she was unable to manage her financial resources and resist fraud or undue influence. She was in constant daily pain on the left side of her body due to a stroke. She was

impaired and confused by her physical disability and pain medication. At all relevant times, Stella was generally unable to make decisions and incapable of making financial decisions. In her diminished mental state, she was unable to understand any of the financial or other counseling that was required to be given to her under the HUD regulations. She was not mentally capable of entering into the agreement. Had she been informed of the Bank's scheme, she would not have entered into the reverse mortgage. As a result of the Bank's acts and omissions, Stella suffered severe and permanent emotional distress, humiliation, anxiety, sleeplessness, gastrointestinal upset, elevated blood pressure, worry, shame, and other noneconomic damages.

Stella died on October 29, 2015, at the age of 89 years. The Bank assigned the reverse mortgage deed of trust to trustees Barrett, Daffin, Frappier, Treder & Weiss, LLP, to conduct a non-judicial foreclosure sale of the property. A foreclosure sale was set for August 11, 2017.

Samuel is Stella's son, heir, beneficiary, successor in interest, and an interested person within the definitions of Probate Code section 48, Code of Civil Procedure sections 377.11 and 377.30, and the Elder Abuse Act. The complaint sought: pre-foreclosure injunctive relief; equitable cancellation and rescission of the reverse mortgage, the deed of trust and the foreclosure sale; a declaration that the reverse mortgage agreement was void and unenforceable; title quieted in his name; noneconomic, economic, and punitive damages; treble damages; and attorney fees and costs.

Demurrer Proceedings

The Bank filed a demurrer on August 21, 2017, on several grounds, including that the amended complaint was barred by the statute of limitations. The Bank also filed a request for judicial notice.

Reece filed objections to the request for judicial notice and an opposition to the demurrer. He argued that the amended complaint did not show on its face that the applicable statutes of limitations had expired, because actual, appreciable injury to Stella's and Samuel's interests occurred in 2016 when the Bank rejected a loan modification and instituted foreclosure proceedings. He also argued that due to Stella's advanced age, diminished mental capacity and disabilities, she did not and could not through reasonable diligence have discovered the facts constituting the financial abuse. Stella would not have subjectively or objectively suspected actual injury until 2016, when the Bank refused her children's offer to refinance, modify or pay the loan, and initiated foreclosure proceedings. In the event that the trial court found the complaint did not sufficiently allege Stella's disabilities, Samuel requested leave to amend to allege additional medical information and facts establishing that the actual injury did not occur until 2016, after Stella's death, when the Bank refused the children's offer to refinance, modify or pay the loan, and took measures to foreclose on the property. Samuel attached a declaration stating that he was Stella's son, one of her successors in interest, and had succeeded to her interest in the action.

The Bank filed replies in support of the demurrer and its request of judicial notice. The trial court issued a tentative ruling, which is not included in the record on appeal. A hearing was held on October 19, 2017, but no reporter's transcript or suitable substitute has been provided in the record on appeal. The trial court adopted its tentative ruling sustaining the Bank's demurrer without leave to amend.

The minute order reflects that the trial court granted the Bank's request for judicial notice of seven recorded documents related to the property at issue, although not the factual matters stated in the documents. The court found Samuel alleged sufficient facts to demonstrate standing and financial elder abuse, but the court sustained the demurrer to the cause of action for elder abuse without leave to amend based on the statute of limitations. The court noted that the statute of limitations to bring an action for financial elder abuse was four years after the plaintiff discovered, or through the exercise of reasonable diligence should have discovered, the facts constituting the financial abuse. In order to plead delayed discovery, the plaintiff must plead facts showing it was not negligent to fail to discover the facts sooner and that the plaintiff had no actual or presumptive knowledge of facts sufficient to provide inquiry notice. The plaintiff had the burden to allege facts showing the time and manner of discovery, and the inability to have made discovery sooner despite reasonable diligence. Conclusory allegations were not sufficient.

It was undisputed that Stella obtained the reverse mortgage on August 20, 2008. The action commenced on February 21, 2017, was therefore untimely on its face. The amended complaint alleged Stella was elderly, physically frail,

and suffered certain cognitive deficiencies during the relevant period. The court stated, “The allegations, however, omit facts of the time and manner of discovery, and inability to have discovered the relevant facts earlier despite reasonable diligence. Specifically, the [amended complaint] fails to allege when and how plaintiff discovered that [the Bank] knowingly provided an insufficient HUD consultation, facts suggesting that plaintiff was reasonably diligent, and facts suggesting that plaintiff was unable to discover the insufficient consultation sooner. [Citation.] [¶] These omissions are concerning because the [amended complaint] alleges that plaintiff’s mother was elderly, physically frail, and suffering cognitive deficiencies for some time, suggesting that plaintiff was caring for her and her financial affairs in the relevant period. [¶] The opposition does not establish that plaintiff has a possibility of pleading around these defects.”

The trial court sustained the demurrer as to the causes of action for constructive fraud and breach of fiduciary duty on the basis that the Bank was not a fiduciary with respect to the plaintiff or his mother. The court sustained the demurrer to the cause of action for declaratory relief, because the underlying claims were defective and declaratory relief was not available. The demurrer to the cause of action to quiet title was sustained on the ground that even had the elder abuse claim been properly pled, there was no dispute that the mortgage was in default. As a result, the Bank’s claim was not without right. The plaintiff could not invalidate the reverse mortgage and retain title to the property. The court also found Samuel’s request for injunctive relief was a remedy and not a separate cause of action.

On November 8, 2017, the trial court executed an order sustaining the demurrer to the amended complaint without leave to amend and a judgment of dismissal. Samuel filed a timely notice of appeal from the judgment.

DISCUSSION

Standard of Review

“A demurrer tests the legal sufficiency of the factual allegations in a complaint. When the court’s ruling sustaining a demurrer is challenged on appeal, we independently review the allegations on the face of the complaint and matters subject to judicial notice to determine whether the complaint alleges facts sufficient to state a cause of action or discloses a complete defense. [Citations.]” (*Sierra Palms Homeowners Assn. v. Metro Gold Line Foothill Extension Construction Authority* (2018) 19 Cal.App.5th 1127, 1132 (*Sierra Palms*).)

“The question whether the trial court ‘abused its discretion’ in denying leave to amend ‘is open on appeal even though no request to amend such pleading was made.’ (Code Civ. Proc., § 472c, subd. (a).) ‘The plaintiff has the burden of proving that [an] amendment would cure the legal defect, and may [even] meet this burden [for the first time] on appeal.’ [Citations.]” (*Sierra Palms, supra*, 19 Cal.App.5th at p. 1132.)

Tolling of Limitations

It is undisputed that although the causes of action accrued in 2008, if the applicable statutes of limitations were

tolled until Stella’s death in October of 2015, then the complaint was timely filed.² Samuel contends the complaint states sufficient facts to establish that the applicable statutes of limitations were tolled by Stella’s “insanity” under Code of Civil Procedure section 352. We agree.

At the time that the reverse mortgage was issued to Stella in this case, Code of Civil Procedure section 352, subdivision (a), provided, “If a person entitled to bring an action, . . . is, at the time the cause of action accrued either under the age of majority or insane, the time of the disability is not part of the time limited for the commencement of the action.”³ (Former Code Civ. Proc., § 352, subd. (a), as amended by Stats. 1994, ch. 1083, § 4, pp. 6466–6467.)

“For purposes of Code of Civil Procedure section 352, a plaintiff is ‘insane’ if ‘incapable of caring for his [or her] property or transacting business or understanding the nature or effects of his [or her] acts’ [Citations.]” (*Alcott Rehabilitation Hospital v. Superior Court* (2001) 93 Cal.App.4th 94, 101 (*Alcott*);

² The original complaint was filed less than 16 months after Stella’s death, on February 21, 2017. The applicable statute of limitations is four years for financial elder abuse (Welf. & Inst. Code, § 15657.7) and for rescission (Code Civ. Proc., § 337, subd.(c)).

³ Code of Civil Procedure, section 352, subdivision (a), currently provides: “If a person entitled to bring an action, . . . is, at the time the cause of action accrued either under the age of majority or lacking the legal capacity to make decisions, the time of the disability is not part of the time limited for the commencement of the action.”

see also *Pearl v. Pearl* (1918) 177 Cal. 303, 306–307; *Wade v. Busby* (1944) 66 Cal.App.2d 700, 703.)

In its ruling, the trial court acknowledged that the complaint includes allegations about Stella’s cognitive deficiencies, but avoided application of section 352, subdivision (a), by focusing on whether her son, Samuel, could have with reasonable diligence discovered the relevant facts underlying the claims. The trial court turned Stella’s cognitive issues into a reason for finding the statutes of limitation had run: the court read the complaint to suggest that Samuel must have been taking care of Stella’s financial affairs in the relevant period, and granted the demurrer on the grounds that Samuel had not, and could not, plead that *he* was unable to discover the claims within the statutory period. The Bank makes these same arguments on appeal.

The trial court’s ruling was based on an erroneous premise: either that the claims belonged to Samuel before Stella’s death, or that Samuel’s inaction was attributable to Stella. But, tolling under section 352, subdivision (a), is not affected by whether Stella had assistance with financial or medical decisions before her death. The cause of action belongs to the incompetent plaintiff. (*Tzolov v. International Jet Leasing, Inc.* (1991) 232 Cal.App.3d 117, 120 (*Tzolov*).) The statute of limitations does not begin to run when a general guardian or guardian ad litem is appointed for an incompetent plaintiff (*ibid.*), or because someone directs the plaintiff’s medical care or has a power of attorney for the plaintiff (*Alcott, supra*, 93 Cal.App.4th at p. 106, fn. 8). “The tolling statute, Code of Civil Procedure section 352, refers in pertinent part only to the

competence of the plaintiff and not to the nature or quality of his or her representation.” (*Tzolov, supra*, 232 Cal.App.3d at p. 120.)

“[A] guardian ad litem is obliged to protect the plaintiff’s cause of action [citation], but to start the limitation period upon the assumption that the guardian ad litem will discharge this duty would leave the incompetent plaintiff wholly at the mercy of the possibility the guardian ad litem will not do so.” (*Tzolov, supra*, 232 Cal.App.3d at p. 120.) “The possibility that in a case such as this a limitation period may remain open for the lifetime of the plaintiff does not dictate a different result: the tolling statute reflects a considered legislative judgment that in enumerated circumstances the strong policy in favor of prompt disposition of disputes must give way to the need to protect a plaintiff who is unable to protect himself or herself. That need will continue so long as the plaintiff remains incompetent.” (*Ibid.*) Given that Samuel did not inherit the claims until Stella’s death, less than two years before he filed, there was no reason he had to plead the time and manner of *his* discovery of the claims.

The Bank next argues that the complaint does not adequately allege facts that Stella was “insane” within the meaning of section 352, subdivision (a). The Bank rests this argument on the fact that Samuel’s 93-page complaint includes an allegation that, if Stella had been counseled by an independent and qualified HUD counseling agency, rather than a conflicted employee of the loan originator, it is reasonably probable she would have selected different financing or decided against a reverse mortgage. The Bank argues this allegation indicates that Stella was not insane, but rather capable of caring for her property, transacting business, and understanding the nature or effects of her acts. We do not agree with the Bank’s

reading of the complaint. The entire thrust of the allegations pleaded is to the contrary. The complaint alleged that on the date Stella entered into the reverse mortgage agreement and continuing until her death, she was in frail health, suffering from the effects of a stroke and dementia, unable to manage her financial resources, and unable to resist fraud or undue influence. She was in constant daily pain on the left side of her body due to a stroke. She was impaired and confused by her physical disability and pain medication. At all relevant times, Stella was generally unable to make decisions. In her diminished mental state, she was unable to understand any of the financial or other counseling that was required to be given to her under the HUD regulations, and she was not mentally capable of entering into the agreement. Her substantial physical and mental limitations restricted her ability to read, understand, and carry out normal activities to protect her rights and finances. Stella was an elderly person who suffered from a stroke, dementia, confusion, cognitive impairment, blindness, high blood pressure, disorientation from prescribed medication and other age-related infirmities that rendered her incapacitated and incapable of understanding the financial nature, effect and consequences of a reverse mortgage. These allegations were sufficient to allege that Stella was incapable of transacting business or understanding the nature or effects of her acts for the purpose of tolling under Code of Civil Procedure section 352, subdivision (a), which continued until her death. On its own and in the context of the overall complaint, the single paragraph cited by the Bank cannot reasonably be read as a factual admission that Stella was capable of understanding and transacting business; rather, we read it as a speculative allegation about what might have happened if she had met with a

counseling agency not beholden to the Bank, regardless of her cognitive abilities. “Pleadings must be reasonably interpreted; they must be read as a whole and each part must be given the meaning that it derives from the context wherein it appears. . . . In determining whether the complaint is sufficient as against the demurrer on the ground that it does not state facts sufficient to constitute a cause of action, the rule is that if on consideration of all the facts stated it appears the plaintiff is entitled to any relief at the hands of the court against the defendants the complaint will be held good although the facts may not be clearly stated, or may be intermingled with a statement of other facts irrelevant to the cause of action shown, or although the plaintiff may demand relief to which he is not entitled under the facts alleged. In passing upon the sufficiency of a pleading, its allegations must be liberally construed with a view to substantial justice between the parties.’ . . . [Citation.]” (*Zakk v. Diesel* (2019) 33 Cal.App.5th 431, 446–447.)

The allegations of the complaint were sufficient to show the statutes of limitations were tolled until Stella’s death by her lack of capacity to transact business or understand the nature of her acts. The demurrer must be overruled on this ground.

Financial Elder Abuse

Samuel contends that the complaint states a cause of action for financial abuse of an elder. We agree.

“The Legislature enacted the Act to protect elders by providing enhanced remedies to encourage private, civil enforcement of laws against elder abuse and neglect. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.) An elder is

defined as ‘any person residing in this state, 65 years of age or older.’ (§ 15610.27.) The proscribed conduct includes financial abuse. The financial abuse provisions are, in part, premised on the Legislature’s belief that in addition to being subject to the general rules of contract, financial agreements entered into by elders should be subject to special scrutiny. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 140 (2013–2014 Reg. Sess.).)” (*Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 478.)

At the time that Stella entered into the reverse mortgage agreement in 2008, Welfare and Institutions Code section 15610.30 provided in pertinent part: “(a) ‘Financial abuse’ of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both. [¶] (b) A person or entity shall be deemed to have taken, secreted, appropriated, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates or retains possession of property in bad faith.” (Former Welf. & Inst. Code, § 15610.30, subds. (a) & (b), as amended by Stats. 2000, ch. 442, § 5, pp. 3220–3221.)⁴

⁴ “In 2008, the Legislature amended subdivision (b) of the statute to provide: ‘A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and *the*

person or entity knew or should have known that this conduct is likely to be harmful to the elder’ (Stats. 2008, ch. 475, § 1, italics added.) The amendment did not become effective until January 1, 2009 (See 77 West’s Ann. Welf. & Inst. Code (2010 supp.) p. XXVI.) This amendment constitutes a material change in the statutory definition of financial abuse. (Balisok, Elder Abuse Litigation, *supra*, p. 8-1 (rev. # 1, 2009) [‘The financial abuse statute, as amended in 2008, presents an essentially new statute.’].) As the 2008 amendments to the statutory scheme were substantive, rather than procedural, and the Legislature did not state that the amendments were retroactive in effect, they are inapplicable to appellant’s claims. (See *ARA Living Centers - Pacific, Inc. v. Superior Court*[(1993)] 18 Cal.App.4th [1556,] 1560–1562 [substantive amendments to elder abuse statute were not retroactive in effect, absent a clear expression of legislative intent].)” (*Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 736–737.)

Welfare and Institutions Code section 15610.30 currently provides in pertinent part: “(a) ‘Financial abuse’ of an elder or dependent adult occurs when a person or entity does any of the following: [¶] (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. [¶] (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70. [¶] (b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder

Lending and foreclosing on a reverse mortgage, which is a creation of statute, was not a wrongful use of Stella's property. "It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid.' . . . [Citation.]" (*Stebley v. Litton Loan Servicing, LLP* (2011) 202 Cal.App.4th 522, 528.) The complaint alleges, however, that the Bank intentionally conducted the reverse mortgage counseling that was required by statute through an unqualified employee with a conflict of interest, rather than providing Stella with a list of independent, HUD-qualified and HUD-approved counseling agencies, with the intent to defraud Stella.

At the time that Stella entered into the reverse mortgage agreement, Civil Code section 1923.2, subdivision (j) provided: "Prior to accepting a final and complete application for a reverse mortgage loan or assessing any fees, a lender shall refer the prospective borrower to a housing counseling agency approved by the United States Department of Housing and Urban Development for counseling. The counseling shall meet the standards and requirements established by the United States Department of Housing and Urban Development for reverse mortgage counseling. The lender shall provide the borrower with a list of at least five housing counseling agencies approved by the

or dependent adult. [¶] (c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult." (Welf. & Inst. Code, § 15610.30, subds. (a), (b), & (c).)

United States Department of Housing and Urban Development, including at least two agencies that can provide counseling by telephone.” (Former Civ. Code, § 1923.2, subd. (j), as amended by Stats. 2006, ch. 202, § 2, pp. 1976–1978.)

Civil Code section 1923.2, subdivision (k), additionally provided: “A lender shall not accept a final and complete application for a reverse mortgage loan from a prospective applicant or assess any fees upon a prospective applicant without first receiving a certification from the applicant or the applicant’s authorized representative that the applicant has received counseling from an agency as described in subdivision (j). The certification shall be signed by the borrower and the agency counselor, and shall include the date of the counseling and the name, address, and telephone number of both the counselor and the borrower. Electronic facsimile copy of the housing counseling certification satisfies the requirements of this subdivision. The lender shall maintain the certification in an accurate, reproducible, and accessible format for the term of the reverse mortgage.” (Former Civ. Code, § 1923.2, subd. (k), as amended by Stats. 2006, ch. 202, § 2, pp. 1976–1978.)⁵

⁵ Civil Code section 1923.2 currently provides in pertinent part: “(j) Prior to accepting a final and complete application for a reverse mortgage the lender shall provide the borrower with a list of not fewer than 10 counseling agencies that are approved by the United States Department of Housing and Urban Development to engage in reverse mortgage counseling as provided in Subpart B of Part 214 of Title 24 of the Code of Federal Regulation. The counseling agency shall not receive any compensation, either directly or indirectly, from the lender or from any other person or entity involved in originating or servicing the mortgage or the sale of annuities, investments, long-

“No arrangement, transfer, or lien subject to this chapter [providing for reverse mortgages] shall be invalidated solely because of the failure of a lender to comply with any provision of this chapter. However, nothing in this section shall preclude the application of any other existing civil remedies provided by law.” (Civ. Code, § 1923.7.)

We agree with the trial court that the allegations that the Bank intentionally provided improper and deficient counseling with the intent to defraud Stella were sufficient to allege a cause of action for financial abuse for the purposes of demurrer. The

term care insurance, or any other type of financial or insurance product. This subdivision does not prevent a counseling agency from receiving financial assistance that is unrelated to the offering or selling of a reverse mortgage loan and that is provided by the lender as part of charitable or philanthropic activities. [¶] (k) A lender shall not accept a final and complete application for a reverse mortgage loan from a prospective applicant or assess any fees upon a prospective applicant until the lapse of seven days from the date of counseling, as evidenced by the counseling certification, and without first receiving certification from the applicant or the applicant’s authorized representative that the applicant has received counseling from an agency as described in subdivision (j) and that the counseling was conducted in person, unless the certification specifies that the applicant elected to receive the counseling in a manner other than in person. The certification shall be signed by the borrower and the agency counselor, and shall include the date of the counseling and the name, address, and telephone number of both the counselor and the applicant. Electronic facsimile copy of the housing counseling certification satisfies the requirements of this subdivision. The lender shall maintain the certification in an accurate, reproducible, and accessible format for the term of the reverse mortgage.” (Civ. Code, § 1923.2, subds. (j) & (k).)

demurrer must be overruled as to the cause of action for financial elder abuse.

Rescission

Samuel contends that the complaint states a cause of action, or can be amended to state a cause of action, for equitable rescission. We agree that Samuel has shown the complaint can be amended to state a cause of action for rescission.

Civil Code section 1688 provides, “A contract is extinguished by its rescission.” A party to a contract may rescind the contract under certain circumstances, as specified in Civil Code section 1689. (*Nmsbpcslahb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959 (*Nms*).) One of the circumstances allowing for rescission is provided in Civil Code section 39, for a contract by a person of unsound mind. (Civ. Code, § 1689, subd. (b)(7).)

Civil Code section 39 states: “(a) A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before the incapacity of the person has been judicially determined, is subject to rescission, as provided in Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3. [¶] (b) A rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist for purposes of this section if the person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence.” (Civ. Code, § 39.)

“In California, as in many states, a party is entitled to rescission of a contract if, when he entered into the contract, he was not mentally competent to deal with the subject before him

with a full understanding of his rights, the test being, in each instance, whether he understood the nature, purpose and effect of what he did. [Citations.] The test is aimed at cognitive capacity and specifically asks the question whether the party understood the transaction which he seeks to avoid. Some contracts require less competence than others, so that the test of understanding varies from one contract to the next. [Citations.]” (*Smalley v. Baker* (1968) 262 Cal.App.2d 824, 832, disapproved on another ground in *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 485.)

“If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties.” (Civ. Code, § 1692.) “The statute essentially ‘restates the equity jurisprudence applicable in the rescission context.’ (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1422.) The fundamental principle underlying that jurisprudence ‘is that “in such actions the court should do complete equity between the parties” and to that end “may grant any monetary relief necessary” to do so. [Citation.]’ (*Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 316 (*Runyan*).) Rescission is intended to restore the parties as nearly as possible to their former positions and “to bring about substantial justice by adjusting the equities between the parties” despite the fact that “the status quo cannot be exactly reproduced.” (*Ibid.*, quoting *Lobdell v. Miller* (1952) 114 Cal.App.2d 328, 344.)” (*Sharabianlou v. Karp* (2010) 181 Cal.App.4th 1133, 1144.)

The amended complaint contains a cause of action for declaratory relief, which requests, among other relief, a

declaration that the reverse mortgage agreement and deed of trust are rescinded, but the complaint does not expressly allege a cause of action for rescission or request that the trial court order equitable monthly payments to restore the Bank's consideration. On appeal, Samuel contends that he can amend the allegations of the complaint to allege a cause of action for rescission, including seeking an order from the trial court for equitable monthly payments to restore consideration furnished by the Bank. We agree that Samuel must be given an opportunity to amend the complaint to allege a cause of action for rescission, particularly as there was only one prior opportunity to amend the complaint.

Additional Causes of Action

Samuel contends that the complaint also states causes of action for breach of fiduciary duty and quiet title, or can be amended to state such causes of action, and perhaps others. We disagree.

“Under the common law, banks ordinarily have limited duties to borrowers. Absent special circumstances, a loan does not establish a fiduciary relationship between a commercial bank and its debtor. (*Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979–981.) Moreover, for purposes of a negligence claim, ‘as a general rule, a financial institution owes no duty of care to a borrower when the institution’s involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money.’ (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) As explained in *Sierra-Bay Fed. Land Bank Assn. v. Superior Court* (1991) 227 Cal.App.3d 318, 334–335, ‘[a] commercial lender is not to be

regarded as the guarantor of a borrower's success and is not liable for the hardships which may befall a borrower. [Citation.] It is simply not tortious for a commercial lender to lend money, take collateral, or to foreclose on collateral when a debt is not paid. [Citations.] And in this state a commercial lender is privileged to pursue its own economic interests and may properly assert its contractual rights. [Citation.]” (*Das v. Bank of America, N.A., supra*, 186 Cal.App.4th at pp. 740–741.)

Samuel has not alleged a relationship between the Bank and Stella outside of the ordinary relationship of a bank and a debtor. The allegation that the Bank failed to properly discharge statutory duties did not change the character of the relationship between the parties to create a fiduciary duty. Samuel has not shown that he can amend the complaint to allege a fiduciary relationship between the Bank and Stella, and therefore, the demurrer to the cause of action for breach of fiduciary duty was properly sustained.

With respect to a cause of action for quiet title, Samuel fails to offer any legal argument that the trial court erred in its determination that there is no viable legal theory for him to both invalidate the reverse mortgage and retain title, and states no facts that could be added by amendment to state a valid quiet title claim. Given that the complaint makes clear that the Bank loaned the money and that the loan is in default, Samuel cannot contend that the Bank has no interest whatever in the property or any part of it, an element of a quiet title claim. (*South Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 741.) Even assuming the Bank failed to comply with the counseling and other requirements for making a reverse mortgage, that would not invalidate the lien on the property such that Samuel could

prevail on a claim to quiet title against the Bank. (Civ. Code, §§ 1923.2, 1923.3, 1923.7.)

Samuel makes vague references in his reply brief to the possibility of amending his complaint to add other causes of action. For example, Samuel cites the various statutory requirements that the Bank provide counseling to Stella and makes a passing reference to negligence. He provides no authority for the filing of a private right of action for statutory violations, or the specific elements of any other claim. Samuel's reliance on "[t]he assertion of an abstract right to amend does not satisfy [his] burden[]" . . . [to] clearly and specifically state "the legal basis for amendment, i.e., the elements of the cause of action," as well as the "factual allegations that sufficiently state all required elements of that cause of action." [Citation.] (*Casiopea Bovet, LLC v. Chiang* (2017) 12 Cal.App.5th 656, 664, citation omitted.)

Judicial Notice

Samuel contends that the trial court abused its discretion by overruling his objections and granting the Bank's request for judicial notice of several documents. The trial court did not take judicial notice of the truth of the matters contained in the documents or rely on the documents in ruling on the demurrer, so no abuse of discretion has been shown.

DISPOSITION

The judgment and the order sustaining the demurrer are reversed. The trial court is directed to enter a new and different order sustaining the demurrer as to the causes of action for breach of fiduciary duty, constructive fraud, and quiet title without leave to amend, sustaining the demurrer to the causes of action for declaratory relief and injunctive remedies with leave to amend to allege rescission, and overruling the demurrer as to the cause of action for elder abuse. Appellant Samuel Reece is awarded his costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.